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SERVICES, INC.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

MARIA BROWN

Plaintiff,

vs.

ITT EDUCATIONAL SERVICES, INC.,
d/b/a ITT Technical Institute, an Indiana
corporation conducting business in the
State of California, and DOES 1-10.

Defendant.

Case No.: '15CV2881 L WVG

**DEFENDANT'S NOTICE OF
REMOVAL TO THE UNITED
STATES DISTRICT COURT FOR
THE SOUTHERN DISTRICT OF
CALIFORNIA PURSUANT TO 28
U.S.C. §§ 1332, 1441(b)**

(Filed concurrently with Declaration of
Phillip B. Frank; Declaration of Jennifer
L. Santa Maria)

State Court
Complaint
filed:

December 23, 2014

TO THE CLERK OF THE UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF CALIFORNIA:

PLEASE TAKE NOTICE that Defendant ITT EDUCATIONAL SERVICES,
INC. ("Defendant") hereby invokes this Court's jurisdiction under the provisions of

28 U.S.C. §§ 1332, 1442(a) and 1442(b) and removes the above-entitled action to this Court from the Superior Court of the State of California in and for the County of San Diego.

1. On December 23, 2014, plaintiff MARIA BROWN (“Plaintiff”) filed a civil action against Defendant in the Superior Court of the State of California, San Diego County, Case No. 37-2014-00043284-CU-OE-CTL, which sets forth the following causes of action: (1) Violation of FEHA; (2) Intentional Infliction of Emotional Distress; (3) Negligent Infliction of Emotional Distress; (4) Failure to Prevent Harassment; (5) Constructive Termination; (6) Unfair Business Practices; and (7) Breach of Contract. Plaintiff named Defendant ITT Educational Services, Inc. and Gary Lopez, an individual, as defendants.

2. On or about January 21, 2015, Defendant received Plaintiff’s Summons and Complaint through service on Defendant’s counsel, per an agreement between counsel. Defendant’s counsel agreed to accept service on behalf of Defendant, and executed a Notice and Acknowledgement of Service on February 9, 2015. True and correct copies of the Summons, Complaint, Civil Cover Sheet, and Notice and Acknowledgment are attached hereto as Exhibit “A” to the Declaration of Jennifer Santa Maria (“Santa Maria Decl.”) filed concurrently herewith. (Santa Maria Decl. ¶ 3.)

3. On March 11, 2015, Defendant timely filed and served a Demurrer in the San Diego County Superior Court.

4. On April 1, Defendant Gary Lopez filed a demurrer.

5. On August 21, 2015, the Court heard the Defendants’ demurrers and issued its ruling on the demurrers. The Court sustained defendant Lopez’ demurrer without leave to amend, and dismissed defendant Lopez from the lawsuit. The Court sustained defendant ITT’s demurrer with leave to amend. A true and correct copy of the Court’s ruling is attached hereto as Exhibit “B” to Santa Maria Decl. filed concurrently herewith. (Santa Maria Decl. ¶ 4.)

6. On August 28, 2015, Plaintiff filed a First Amended Complaint (“FAC”). The FAC alleges four causes of action: (1) Violation of FEHA; (2) Failure to Prevent Harassment; (3) Constructive Termination; and (4) Unfair Business Practices. A true and correct copy of Plaintiff’s FAC is attached hereto as Exhibit “C” to Santa Maria Decl. filed concurrently herewith. (Santa Maria Decl. ¶ 5.) The FAC continued to make reference to defendant Gary Lopez. (See FAC (Exhibit “C”) at ¶ 1.)

7. Defendant filed a demurrer and motion to strike the FAC on September 29, 2015, based in part on the reference in the FAC to defendant Gary Lopez. (Santa Maria Decl. ¶ 6.)

8. On October 30, 2015, the Court heard Defendant’s demurrer and motion to strike the FAC. The Court sustained the demurrer as to the third and fourth causes of action without leave to amend, and granted the motion to strike the FAC. A true and correct copy of the Court’s order is attached hereto as Exhibit “D” to Santa Maria Decl. filed concurrently herewith. (Santa Maria Decl. ¶ 7.)

9. On November 9, 2015, Defendant timely filed and served an Answer in the San Diego County Superior Court. A true and correct copy of Defendant’s Answer is attached hereto as Exhibit “E” to Santa Maria Decl. filed concurrently herewith. (Santa Maria Decl. ¶ 8.)

10. This case, as stated by Plaintiff’s Complaint, was not removable because it did not affirmatively allege Plaintiff’s citizenship. (Santa Maria Decl., ¶ 9; *See, Complaint and FAC, generally; See also Harris v. Bankers Life & Cas. Co.*, 425 F.3d 689, 694 (9th Cir. 2005) (observing that the “first thirty-day period for removal in 28 U.S.C. § 1446(b) only applies if the case stated by the initial pleading is removable on its face”) (emphasis added); *Kanter v. Warner-Lambert Co.*, 265 F.3d 853, 857-858 (9th Cir. 2001) (a complaint which merely alleges the residence of the Plaintiff fails to establish the citizenship of the plaintiff for the purpose of diversity jurisdiction).) Accordingly, the 30-day deadline provided for in 28 U.S.C.

1 § 1446(b) with respect to service “of the initial pleading” was never triggered in the
2 instant matter.

3 11. On or about November 6, 2015, Defendant propounded Requests for
4 Admissions (Set One) to Plaintiff which requested that Plaintiff provide information
5 regarding her citizenship. (Santa Maria Decl., ¶ 10, Exhibit “F”.)

6 12. Plaintiff served her responses to Defendant’s Request for Admissions
7 (Set One) on December 18, 2015. (Santa Maria Decl., ¶ 11, Exhibit “G”.) In her
8 responses, Plaintiff admitted that she was domiciled in the state of California when
9 she filed her complaint. (*Id.*)

10 13. When a case stated by the initial pleading is not removable, a notice of
11 removal may be filed within 30-days after receipt by the defendant, through service
12 or otherwise, of a copy of an amended pleading, motion, order or other paper from
13 which it may first be ascertained that the case is subject to removal. (28 U.S.C. §
14 1446(b)(3).)

15 14. Here, Defendant received discovery responses indicating that the case
16 was removable on December 18, 2015. As such, this removal is timely because it
17 was filed within 30 days of December 18, 2015. (Santa Maria Decl., ¶ 11.)

18 15. To date, Defendant has not received any document, other than those
19 included in Exhibits “A” through “H” which would constitute an “other pleading,
20 motion, order or other paper” within the meaning of 28 U.S.C. § 1446(b). (Santa
21 Maria Decl., ¶ 13.)

22 16. In accordance with 28 U.S.C. § 1446(d), the undersigned counsel
23 certifies that a copy of this Notice of Removal and all supporting papers promptly
24 will be served on Plaintiff’s counsel and filed with the Clerk of the San Diego
25 County Superior Court. (Santa Maria Decl. ¶ 14.) Therefore, all procedural
26 requirements under 28 U.S.C. § 1446 have been satisfied.

27 17. Venue of this action lies in the United States District Court for the
28 Southern District of California pursuant to 28 U.S.C. § 1441(a) and 1391(c) because

1 this is the judicial district of this Court in which the action arose and where the
2 causes of action arose.

3 DIVERSITY JURISDICTION

4 18. Citizenship of the parties in this Action is determined by their
5 citizenship status at the Action's commencement. See *Mann v. City of Tucson*, 782
6 F.2d 790 (9th Cir. 1986).

7 19. For diversity purposes, a person is a "citizen" of the state in which he is
8 domiciled. *Kantor v. Wellesley Galleries, Ltd.*, 704 F.2d 1088, 1090 (9th Cir. 1983).
9 A person's domicile is the place where he resides with the intention to remain or to
10 which he intends to return. *Kanter v. Warner-Lambert Co.*, 265 F.3d 853, 857 (9th
11 Cir. 2001).

12 20. In response to Defendant's Requests for Admission (Set One), Plaintiff
13 admits that, at the time of the filing of the Complaint, she was domiciled in the state
14 of California. (Plaintiff's Responses to Defendant's Requests for Admission (Set
15 One) No. 1, attached as Exhibit "G" to Santa Maria Decl.) (Santa Maria Decl., ¶ 11.)

16 21. Therefore, Plaintiff is a citizen of the State of California.

17 22. A corporation is considered for diversity purposes a citizen of any state
18 in which it is incorporated and where it has its principal place of business. 28 U.S.C.
19 § 1332(c)(1).

20 23. Defendant, both at the time this action was commenced and the time it
21 was removed to federal court, is either a citizen of the State of Delaware or the State
22 of Indiana within the meaning of Section 1332(c)(1), because it was at all times a
23 corporation formed under the laws of the State of Delaware, with its principal place
24 of business and corporate headquarters located at Indiana. (Declaration of Phillip B.
25 Frank ("Frank Decl.") ¶ 3-4 filed herewith.) The State of Indiana is where all of
26 Defendant's primary executive, administrative, financial, and management functions
27 are conducted and where the high level officers direct, control, and coordinate the
28 corporation's activities. *The Hertz Corporation v. Friend*, 130 S.Ct. 1181 (2010).

1 Defendant was at the time the Complaint was filed, and still is, incorporated in the
2 State of Delaware. (Frank Decl., ¶ 3.)

3 24. Defendant's principal place of business is in the State of Indiana.
4 Defendant has campus locations in thirty-nine (39) different states, but performs the
5 vast majority of its executive and administrative functions at its Carmel, Indiana
6 corporate office. (Frank Decl., ¶ 4.) For example, Defendant's President, Chief
7 Financial Officer, and highest ranking human resources employees are all located in
8 Carmel, Indiana. (*Id.*) Accordingly, Defendant is (and was at the time of filing of the
9 Complaint) a citizen of the State of Indiana and Delaware.

10 25. Defendant is not aware of any Doe defendants having been served with
11 a copy of the Summons and Complaint. The citizenship of Doe defendants is
12 disregarded for the purpose of removal. 28 U.S.C. § 1441(a) (“[f]or purposes of
13 removal under this Chapter, the citizenship of defendants sued under a fictitious
14 name shall be disregarded.”) Accordingly, there are no other named defendants to
15 join Defendants in this Notice of Removal.

16 26. As none of the defendants named in this matter are citizens of California
17 where this action was brought, there is complete diversity allowing removal by non-
18 resident defendants. 28 U.S.C. §§ 1441, *et seq.*; *Getty Oil Corp. v. Insurance Co. of*
19 *North America*, 841 F.2d 1254, 1258 (5th Cir. 1988).

20 27. Therefore, this action is brought between citizens of different states
21 under the definition of 28 U.S.C. §1332.

22 **AMOUNT IN CONTROVERSY**

23 28. Where a plaintiff's state court complaint is silent as to the amount of
24 damages claimed, the removing defendant need only establish that it is more
25 probable than not that plaintiff's claim exceeds the jurisdictional minimum. *Sanchez*
26 *v. Monumental Life Ins. Co.*, 95 F.3d 856, 860-861 (9th Cir. 1996).

27 29. In determining whether the amount in controversy exceeds \$75,000, the
28 Court must presume the plaintiff will prevail on each and every one of his claims.

1 *Kenneth Rothschild Trust v. Morgan Stanley Dean Witter*, 199 F.Supp. 993, 1001
 2 (C.D. Cal. 2002), *citing*, *Burns v. Windsor Ins. Co.* 31 F.3d 1092, 1096 (11th Cir.
 3 1994) (the amount in controversy analysis presumes that “plaintiff prevails on
 4 liability”) and *Angus v. Shiley Inc.*, 989 F.2d 142, 146 (3d Cir. 1993) (“the amount in
 5 controversy is not measured by the low end of an open-ended claim, but rather by
 6 reasonable reading of the value of the rights being litigated”). The argument and
 7 facts set forth herein may appropriately be considered in determining whether the
 8 jurisdictional amount in controversy is satisfied. *Cohn v. Petsmart, Inc.*, 281 F.3d
 9 837, 843 n.1 (9th Cir. 2002), *citing*, *Willingham v. Morgan*, 395 U.S. 402, 407 n.3
 10 (1969).

11 30. The amount in controversy may include general and special
 12 compensatory damages, and attorney’s fees which are recoverable by statute. *Galt*
 13 *G/S v. JSS Scandinavia*, 142 F.3d 1150, 1155-1156 (9th Cir. 1998). The Court may
 14 examine the nature of the action and the relief sought and take judicial notice of
 15 attorney’s fee awards in similar cases. See, e.g., *Simmons v. PCR Technology*, 209
 16 F.Supp.2d 1029, 1035 (N.D. Cal. 2002) (noting that attorneys’ fees in individual
 17 employment discrimination cases often exceed damages).

18 31. Cases in the Ninth Circuit firmly establish that statutory attorneys’ fees
 19 will be included as a basis for determining the jurisdictional amount in controversy.
 20 See, *Galt G/S, supra*, 142 F.3d at 1155-56. Furthermore, such fees are calculable
 21 beyond the time of removal. *Simmons v. PCR Technology, supra*, 209 F.Supp.2d at
 22 1035.

23 32. Punitive damages are also included in calculating the amount in
 24 controversy. *Davenport v. Mutual Ben. Health & Acc. Ass’n*, 325 F.2d 785, 787 (9th
 25 Cir. 1963); see also *Aucina v. Amoco Oil Co.*, 871 F.Supp. 332 (S.D. Iowa 1994).
 26 The potential punitive damage award against defendants such as Hilton Worldwide -
 27 alone may satisfy the amount in controversy. Although Defendant vigorously denies
 28 Plaintiff’s allegations, if Plaintiff were to prevail, the punitive damages alone could

1 well exceed the \$75,000 jurisdictional minimum. Accordingly, Plaintiff's
 2 allegations satisfy the jurisdictional prerequisite for amount in controversy as it
 3 cannot be said to a legal certainty that Plaintiff would not be entitled to recover the
 4 jurisdictional amount. *Anthony v. Security Pacific Financial Services, Inc.*, 75 F.3d
 5 311, 315 (7th Cir. 1996); *Watson v. Blankinship*, 20 F.3d 383, 386-387 (10th Cir.
 6 1994).

7 33. In *Aucina v. Amoco Oil Co.*, the defendant-employer established the
 8 amount in controversy exceeded the jurisdictional minimum where the former
 9 employee asserted claims for lost wages, lost benefits, mental anguish, and punitive
 10 damages. The court noted that the defendant was a Fortune 500 Company, and that
 11 "[b]ecause the purpose of punitive damages is to capture a defendant's attention and
 12 deter others from similar conduct" the plaintiff's claim for punitive damages "might
 13 alone" exceed the jurisdictional minimum. *Aucina, supra*, 871 F.Supp. at 334.

14 34. Further, it is well-settled that a settlement demand setting forth an
 15 estimate of plaintiff's claims may be used to demonstrate the amount in controversy.
 16 *Cohn v. Petsmart, Inc.*, 281 F.3d 837, 840 (9th Cir. 2002) ("letter [from plaintiff's
 17 attorney] is relevant evidence of the amount in controversy if it appears to reflect a
 18 reasonable estimate of the plaintiff's claim."); *see also Babasa v. LensCrafters, Inc.*,
 19 498 F.3d 972, 973-75 (9th Cir. 2007) (pre-mediation demand letter constitutes
 20 evidence of the amount in controversy); *Rising-Moore v. Red Roof Inns, Inc.*, 435
 21 F.3d 813, 815-16 (7th Cir. 2006) ("[plaintiff]'s lawyer has revealed what he thinks
 22 his loss amounts to . . . This is the amount 'in controversy.'"); *Arellano v. Home*
 23 *Depot*, 245 F.Supp.2d 1102, 1108 (S.D. Cal. 2003) (holding that plaintiff's
 24 settlement letter seeking \$70,000 was evidence that the amount in controversy met
 25 the jurisdictional threshold because "the Ninth Circuit has clearly established that a
 26 court may rely solely upon a settlement letter in determining the amount in
 27 controversy if the letter appears to reflect a reasonable estimate of the plaintiff's
 28 claim").

1 35. In this case, the amount in controversy is easily ascertained from
2 Plaintiff's settlement demand to Defendant. On August 31, 2015, Plaintiff - through
3 her attorney of record, made a settlement demand stating "Attorney's fees through
4 trial are presently estimated to be \$350,000, though based on past experience with
5 ITT, fees could be as high as \$1M, depending upon whether a multiplier is applied,
6 and depending on how much discovery is undertaken. Based on the above
7 considerations, I am authorized to make a demand of \$285,000.00." (Attached as
8 Exhibit "H" to the Santa Maria Decl.) (Santa Maria Decl., ¶ 12.)

9 WHEREFORE, Defendant removes the above-entitled action now pending in
10 the Superior Court of the State of California for the County of San Diego to this
11 Court.

12
13 DATED: December 21, 2015

OGLETREE, DEAKINS, NASH,
SMOAK & STEWART, P.C.

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15
16 By: Jennifer L. Santa Maria
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